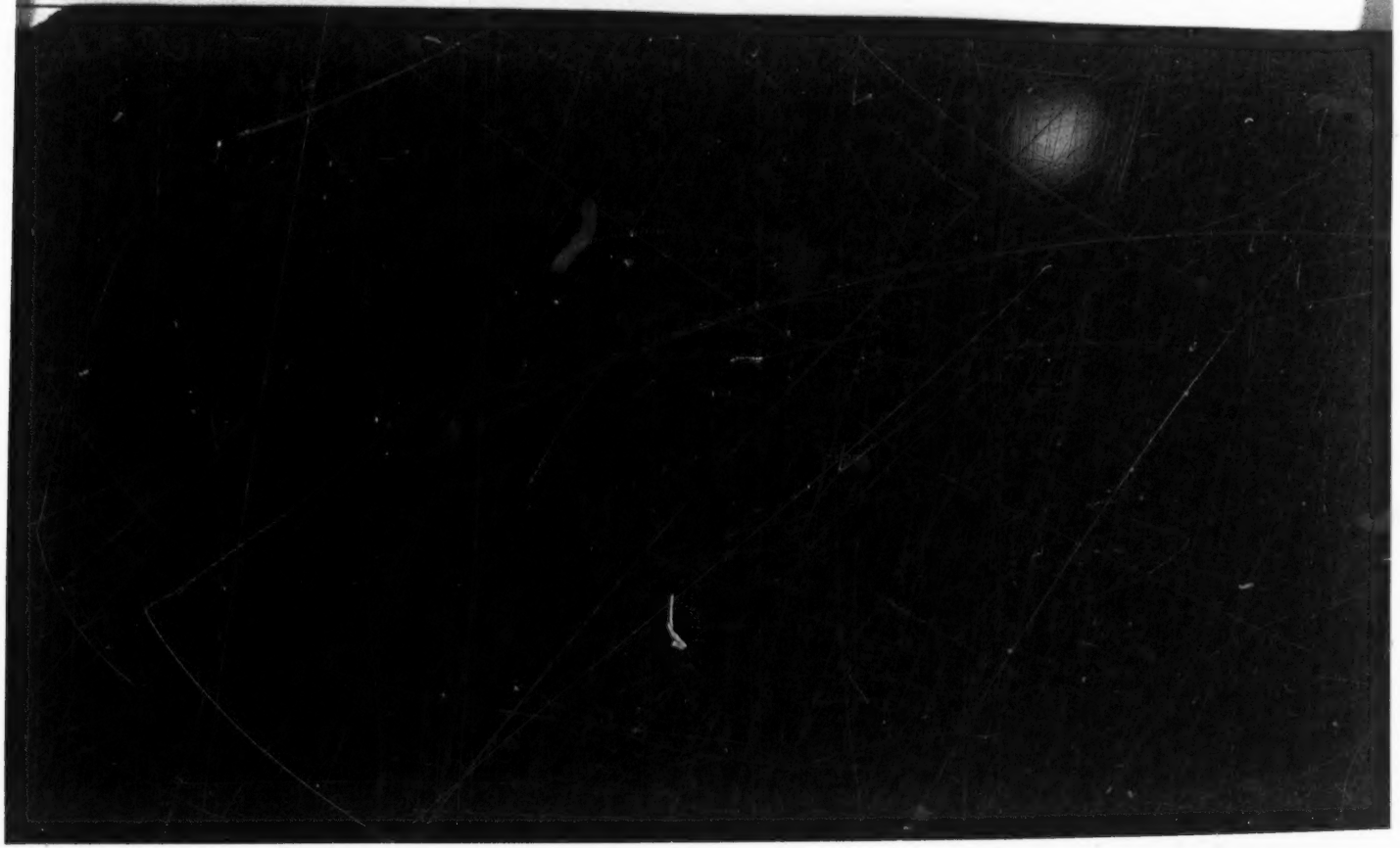


IN THE

Supreme Court of the United States.

OCTOBER TERM, 1904.

FREDERICK W. LINCOLN and others, Plaintiffs in Error, AGAINST THE UNITED STATES, Defendant in Error.	No. 149.
WARNER, BARNES & Co., Limited, Appellant, AGAINST THE UNITED STATES, Appellee.	No. 466.

STATEMENT.

The Lincoln Case No. 149, comes up by writ of error from the District Court of the United States for the Southern District of New York, where judgment was rendered against the claimant dismissing the petition upon a demurrer interposed to the answer of the United States.

The Warner-Barnes case, No. 466, comes up by appeal from a judgment of the Court of Claims dismissing

the petition upon a trial of the issues raised by a general traverse to the petition.

In both cases the claimants seek to recover duties exacted of them at the Port of Manila, Philippine Islands between the dates of April 11th, 1899, and October 25th, 1901 upon merchandise shipped by them from the Port of New York.

Both cases present the same defense, to wit:

That by reason of the insurrection in the Philippine Islands, the Islands became hostile territory, were not in the possession of the United States except by force of arms and that as a consequence trade with such territory was unlawful unless permitted by the Military Commander; that all shipments of merchandise to Manila were, under the laws and usages of war, liable to such impositions as the Military Commander chose to make, either as customs duties or as a condition for leave to trade with an enemy in hostile territory.

This is the ground upon which the exaction of the duties complained of was sustained by the Courts below.

The answer in the Lincoln case (Rec., pp. 8 & 9), alleges that:

> "There existed an armed insurrection in said Phil-
> "ippine Islands * * * whereby the Territory
> "of said Islands was rendered hostile and trade with
> "said hostile territory was unlawful except by the
> "permission of the Commander of the belligerent
> "force then conducting military operations in said
> "hostile territory."
>
> That "while it is true that the town and port of
> "Manila in said Islands was in the actual possession
> "of the United States * * * yet, said posses-
> "sion was challenged and interfered with by hostile,

"insurrectionary, military forces and was held by "the United States only by force of arms and mil- "itary occupation and government as a part of a "*hostile territory.*"

"That after February 4th, 1899, when said hos- "tilities against the United States in said Islands "were inaugurated, all articles of merchandise "* * * shipped to and entered in any port "of the said Islands, including Manila, *then ter- "ritory hostile to the United States,* were under "the laws and usages of war, and the Consti- "tution and Laws of the United States and under "the orders and regulations of the Military Com- "mander, * * * liable to the payment of "the several sums of money mentioned and set forth "in said petition as duties and payable to the mili- "tary officer of the United States, then acting as col- "lector of customs for the Port of Manila, not only "under said laws, usages, orders and regulations, "but also as a condition imposed upon the privilege "of trading with hostile territory."

The sufficiency of these facts to constitute a defense was raised by a demurrer interposed by the claimant to the answer. This demurrer does not, however, admit the existence of any facts alleged in the answer to the contrary of facts of which *this Court* takes judicial notice.

Jones v. *U. S.*, 137 U. S., at 215.
The Three Friends, 166 U. S., at 63.
Underhill v. *Hernandez*, 168 U. S., at 253.

In the Warner-Barnes case, the opinion of the Court states the ground of the decision as follows (p. 20):

"The case then clears itself to the single question: "If a state of war existed in the Philippine Islands, "did that *ipso facto* justify the exaction of the tariffs

"that were collected? That such war did exist be-
"fore and after the exchange of ratifications of the
"Treaty with an armed military power in said
"Islands is beyond dispute, and whether such war
"was declared or recognized in a particular man-
"ner or not seems to us is but to beg the question.
"All men must be held to intellectual honesty to see
"and know the things that are plainly given them to
"see and know. * * *

"At the time the ratifications of the Treaty of
"Peace were exchanged, the Treaty had thereafter
"the force of law but by reason of the war existing in
"the Islands at the time, it *failed to become effec-*
"tive and it, as well as all other merely civil law,
"was suspended and superseded by military law,
"until such time as it might be possible to put the
"treaty and civil law in force and establish proper
"administrative and judicial authorities to admin-
"ister and enforce the same." (Rec., pp. 21-22).

"The tariffs paid by the plaintiff were not levied
"or collected by virtue of the general statutes of the
"United States relative to customs nor by authority
"of any general law, nor in the exercise of the civil
"powers of the Government, the latter never having
"been in force in consequence of the prevailing war
"throughout said Islands, but such tariffs were col-
"lected solely as a military contribution exacted by
"the Military Government and as a condition an-
"nexed to the privilege of importing goods upon
"which the duties were levied, and this is distinguish-
"able from Diamond Rings, 183 U. S., 176, *where*
"the question was as to the enforcement of the
"statute at Chicago, Illinois, against property taken
"there from Luzon."

(Rec., p. 22.)

As cession of territory to and possession by the ac-
quiring power are the only requisites to bring territory

under the sovereignty and render it subject to the laws of the acquiring state, and as the cession by the Treaty of Paris is not here questioned, the basis of this defense can be no other than that the Philippine Islands were not, or more correctly, that the Port of Manila was not, at the time of the exactions complained of, in the possession of the United States, but was in the possession and under the domination of another power,—or at best in the possession of another power to such an extent that the sovereignty of the United States could not be there exercised.

The proposition applied to these cases resolves itself into this: That the City of Manila over which the United States had complete admitted *de jure* title and absolute, complete, physical possession was rendered hostile territory, so that the sovereignty of the United States was "suspended and superseded" and intercourse between it and the other parts of the United States was rendered unlawful, because of insurrection in some other portions of the Islands.

This position can only be maintained by striking from our judicial records the case of the Fourteen Diamond Rings.

The appellants contend:

a. That the question herein involved has already been definitely and completely determined by the decisions of this Court in the three cases of *DeLima* v. *Bidwell,* 182 U. S. 1, *Dooley* v. *United States,* 182 U. S., 222, and *Fourteen Diamond Rings,* 183 U. S., 176, which are conclusive of the cases at bar.

b. That the trade in these cases was not with the insurgents nor with the enemy, assuming, as counsel for the

United States here claims, the Filipino insurrectionists to belong to that category. It was trade between Manila and New York, Manila being a place which had been in the possession of the United States since the 12th of August, 1898, had never been in the possession of the Filipino insurrectionists and which became, after the Treaty of Paris, *de jure* as well as *de facto,* a port of the United States in the complete possession of the lawful authorities of the United States.

POINT I.

ALL THE QUESTIONS INVOLVED IN THE CAUSES AT BAR HAVE BEEN FINALLY DECIDED BY THIS COURT IN THE INSULAR CASES.

1. *Manila was not hostile territory and the possession and sovereignty of the United States were complete.*

This question has been determined by this Court.

In *DeLima* v. *Bidwell,* 182 U. S., 1, the Court held (p. 180):

> "The status of Porto Rico was this: The Island "had been for some months under military occupa- "tion by the United States as a conquered country, "when, by the second article of the Treaty of Peace "between the United States and Spain, signed De- "cember 10, 1898, and ratified April 11, 1899, Spain "ceded to the United States the Island of Porto Rico, "which has ever since remained in our possession "and has been governed and administered by us."

The Court, after an examination of authorities, sums them up as follows:

"From this resumé of the decisions of this Court, "the instructions of the Executive Departments, and "the above Act of Congress (Foraker Act), it is evi- "dent that, from 1803, the date of Mr. Gallatin's "letter, to the present time, there is not a shred of "authority, except the dictum in Fleming *v.* Page "(practically overruled in Cross *v.* Harrison) for "holding that a district ceded to and in the posses- "sion of the United States remains for any purpose "a foreign country. Both these conditions must "exist to produce a change of nationality for rev- "enue purposes * * * (p. 194).

"We are, therefore, of opinion that at the time "these duties were levied Porto Rico was not a for- "eign country within the meaning of the tariff laws, "but a territory of the United States" (p. 200).

This case has definitely and positively laid down the criterion by which to determine whether a country has or has not ceased to be foreign as far as the United States is concerned.

Cession to and possession by, the United States are the determinative factors.

The country thus ceasing to be foreign, duties upon goods imported therefrom into the United States cannot be taxed under any law applying to foreign countries. Such country has ceased to be within the category of foreign, and has become domestic territory of the United States.

Applying this reasoning and this criterion to the Philippine Islands, the question is: whether they were ceded to and in the possession of the United States at the time of these exactions. If they were, then they had ceased to be foreign, and the only remaining question would be as to the power of the President of the United States or the

commander of the armies of the United States in the Philippines, acting in pursuance of the authority delegated to him by the President, to impose a customs tariff upon goods coming from the United States into the Philippines, a domestic territory. Were this question still open the position of the claimants might present more difficulties.

2. *The President had not the power, after the ratification of the treaty, to collect the duties involved in these cases.*

That question, left undecided in *DeLima* v. *Bidwell,* has been definitely set at rest by the decision of this Court in *Dooley* v. *U. S.,* 182 U. S., 222.

The question there was as to the right of the comder-in-chief to impose duties upon goods coming into Porto Rico from the United States after the ratification of the Treaty of Paris. Owing to the important principles laid down in this case, and to its bearing upon the position of the claimant, it is worthy of a somewhat careful analysis.

In *DeLima* v. *Bidwell,* it had been held that the Dingley Act, imposing duties on goods from foreign countries, did not apply to Porto Rico. The collector had made exactions under the supposed authority given him by that law. The source of this supposed authority was the legislative power of Congress.

The authority upon which the duties were levied in the Dooley case was the order of the President. The source of this supposed authority was the power of the President under the Constitution as commander-in-chief of the military forces of the United States.

Before the ratification of the treaty the Military Commander, says Mr. Justice Brown,

> "has all the powers of a *de facto* Government, and "can at his pleasure either change the existing laws "or make new ones. * * *
>
> "At the same time while the right to administer "the Government continued, the conclusion of the "Treaty of Peace and the cession of the Island to "the United States were not without their signif- "icance. By that act Porto Rico ceased to be a for- "eign country, and the right to collect duties upon "imports from that Island ceased. *We think the co- "relative right to exact duties upon importations "from New York to Porto Rico also ceased.* The "spirit as well as the letter of the tariff laws admit "of duties being levied by a Military Commander "only upon importations from foreign countries; and "while his power is necessarily despotic, this must be "understood rather in an administrative than in a "legislative sense. While in legislating for a con- "quered country he may disregard the laws of that "country, he is not wholly above the laws of his own. "*For instance, it is clear that while a Military Com- "mander during the Civil War was in the occupation "of a Southern port, he could impose duties upon "merchandise arriving from abroad, it would hardly "be contended that he could also impose duties upon "merchandise arriving from ports of his own coun- "try.* * * *
>
> "*In our opinion the authority of the President as "Commander-in-Chief to exact duties upon imports "from the United States ceased with the ratification "of the Treaty of Peace.*"
>
> (*Dooley* v. *U. S.*, 182 U. S., 231, 234, 236.)

The analysis of the foregoing leads to this conclusion: The right to impose duties originally exercised by

the President prior to the ratification of the treaty under the law of belligerent right was exercised in regard to goods coming from the United States because Porto Rico was then a foreign country with respect to the United States and conversely the United States was a foreign country with respect to Porto Rico so that their imposition was in accordance with the spirit and letter of an Act of Congress which imposed duties upon articles "imported from foreign countries."

It thus appears that two elements were requisite in order to validate the duties so imposed.

1. A military government possessing the usual attributes of such government under the law; and

2. The fact that the status of the port from which the shipment was made toward the port of entry was that of a port in a foreign country.

Thus it will be seen that the right which the President exercised in Porto Rico was, as Mr. Justice Brown puts it, "the same right as that which the collector at New York "exercised," because it was predicated upon the existence of the same fact, namely, the coming of goods from a foreign country.

It is evident upon an examination of the Dooley case that the ratification of the treaty did not deprive the military government in the Philippine Islands of the power which it had upon the conquest of Manila from Spain, to impose duties upon goods imported from a foreign country.

The ratification of the treaty did, however, create a new situation, namely, the "cession of the Island to the

"United States," and the extinguishment of its status as a foreign country. The Military Commander then, as before, while free from any restraint arising from the local laws, was nevertheless, not superior to the laws of his own country. While therefore, "the spirit and the "letter of the tariff laws authorized him to impose duties "upon goods from foreign countries," the same "spirit "and letter," prevented his imposing duties upon goods coming from his own country. In other words, the commander (that is to say, the President), is bound to regard the tariff laws of the United States.

3. *This Court has decided that the language of the order under which these duties were collected did not authorize their collection after the ratification of the treaty.*

A further and equally decisive consideration urged by Mr. Justice Brown in the *Dooley* case (p. 235) is that,

> "Without questioning at all the original validity "of the order imposing duties upon goods imported "into Porto Rico from foreign countries, we think "the proper construction of that order is that it "ceased to apply to goods imported from the "United States from the moment the United "States ceased to be a foreign country with respect "to Porto Rico, and that until Congress otherwise "constitutionally directed such merchandise was en- "titled to free entry."

We print the enacting portions of the two orders in parallel columns, matter in the Porto Rican order not included in the Philippine, in parentheses; matter in the Philippine not in the Porto Rican in *italics*.

PORTO RICAN ORDER.

EXECUTIVE MANSION,

(January 20, 1899).

By virtue of the authority vested in me as Commander-in-Chief of the Army and Navy of the United States of America, I do hereby order and direct that the following tariff of duties and taxes (shall) be levied and collected, and (the) regulations for the administration thereof shall take effect and be in force in (all) ports and places (in the Island of Porto Rico and all islands in the West Indies east of the 74th degree, west longitude, evacuated by Spain, on and after February 1, 1899.

All) questions arising (in the administration of customs shall be referred to the collector at the port of San Juan for decision, and there shall be no appeal from such decision except in cases where the collector may find it expedient to ask for special instructions of the War Department on the points involved.)

Necessary and authorized expenses for the administration of said tariff

PHILIPPINE ORDER.

EXECUTIVE MANSION,

July 12, 1898.

By virtue of the authority vested in me as Commander in Chief of the Army and Navy of the United States of America, I do hereby order and direct that *upon the occupation and possession of any ports and places in the Philippine Islands by the forces of the United States*, the following tariff of duties and taxes, *to* be levied and collected *as a military contribution*, and regulations for the administration thereof, shall take effect and be in force in *the* ports and places *so occupied*. Questions arising *under the said tariff and regulations shall be decided by the general in command of the United States forces in those islands.*

Necessary and authorized expenses for the administration of said tariff and

and regulations shall be paid from the collections thereunder.

Accurate accounts of collections and expenditures shall be kept and rendered to the Secretary of War.

WILLIAM MCKINLEY.

("Records and Briefs in the Insular Cases Printed under Direction of Congress," page 773).

regulations shall be paid from the collections thereunder.

Accurate accounts of collections and expenditures shall be kept and rendered to the Secretary of War.

WILLIAM MCKINLEY.

(Finding Number 5, page 12, Record in Warner-Barnes case.)

The wording of the two orders is practically the same and the identical language in both orders must have the same meaning. Indeed the very differences of the wording of the Philippine order show that it was intended purely and simply as a "war measure" *during the war with Spain* while the Porto Rican order was promulgated after the treaty was signed.

4. *There is no legal distinction between the status of Manila at the time of the exaction of these duties and that of Porto Rico prior to the passage of the Foraker Act.*

It follows from the above argument that if, as in the case of Porto Rico, the Philippine Islands were ceded to and in the possession of the United States, the President, as the Commander-in-Chief could not impose duties on goods coming from the United States into those Islands.

It is urged, however, by the Government that the existence of an insurrection in the Philippine Islands distinguishes the cases at bar and takes them out of the purview of either of the foregoing cases. As the Philippine

Islands were undoubtedly ceded by Spain to the United States under the same treaty which ceded Porto Rico, the contention of the Government must be that the Philippines were not in the possession of the United States. If they were in such possession all the necessary requisites laid down in the *DeLima* case exist, hence the Commander-in-Chief cannot in contradiction of the tariff laws of his own country treat the Philippines as foreign to the United States or the United States as foreign to the Philippines.

The Government's contention that, war existing in the Philippines, the Commander-in-Chief had the right to tax intercourse between the Philippines and the United States, is equivalent to the statement that the Philippine Islands were not in the possession of the United States.

This is plainly the ground adopted by the Court of Claims, which contends (Record *Warner-Barnes Case,* p. 22), that by reason of the insurrection the Treaty of Cession "failed to become effective," was "suspended "and superseded" and

> "until the military forces of the United States had "suppressed armed resistance against its authority "and *established its sovereignty in the Islands,* the "Government *could not give the effect to the treaty* "contemplated by the high contracting parties."

If the Islands were in the possession of the United States, then under the *DeLima* and *Dooley* cases imports from the United States could not be taxed by the President except in accordance with an Act of Congress. If they were not in the possession of the United States, but in that of the Tagalog insurgents, then they were in whole or in part under a domination other than that of the United States; they were hostile territory *and conse-*

quently foreign territory. The Philippines would thus have been in the same position as was Porto Rico before the ratification of the Treaty with Spain.

If, therefore, the two cases above mentioned, *DeLima* and *Dooley,* were the only ones decided by this Court, the question might still be an open one as to whether or not the insurrection existing in the Philippines did so affect the possession of the United States that those Islands remained in legal effect foreign. If so "the "spirit and letter of the tariff laws" not applying to them, the Commander-in-Chief might have been authorized to tax goods coming into them from the United States, and his order promulgated during the Spanish War imposing such taxes might then be construed as applying to importations from the United States.

But this question again has been decided by this Court in the case of the *Fourteen Diamond Rings,* 183 U. S., 176. The Court dealing with the identical contention here made by the Government, said:

> "The Philippines were not simply occupied, but "acquired, and having been granted and delivered to "the United States by their former master were no "longer under the sovereignty of any foreign na- "tion." (p. 178.) * * *
>
> "It is further contended that a distinction exists "in that while *complete possession* of Porto Rico was "taken by the United States, this was not so as to the "Philippines *because of the armed resistance of the "native inhabitants to a greater or less extent.*
>
> "We must decline to assume that the Government "wishes thus to disparage the title of the United "States, or *to place itself in the position of waging a "war of conquest.*
>
> "The sovereignty of Spain over the Philippines "and possession under claim of title had existed for a

"long series of years prior to the war with the "United States. The fact that there were insurrec- "tions against her or that uncivilized tribes may "have defied her will, did not affect the validity of her "title. She granted the Islands to the United States, "and the grantee in accepting them took nothing less "than the whole grant.

"If those in insurrection against Spain continued "in insurrection against the United States, *the legal "title and possession of the latter remained unaf- "fected.*

"We do not understand that it is claimed that in "carrying on the pending hostilities the Government "is seeking to *subjugate the people of a foreign "country*, but, on the contrary, that it is preserving "order and suppressing insurrection in territory of "the United States. It follows that the possession "of the United States is adequate possession under "legal title *and this cannot be asserted for one pur- "pose and denied for another.* We dismiss the sug- "gested distinction as untenable" (pp. 180, 181).

Mr. Justice Brown, concurring, says at pages 182 and 184:

"I concur in the conclusion of the court in this "case and in the reasons given therefor in the "opinion of the Chief Justice. * * *

"I have no doubt the treaty might have provided "as did the Act of Congress annexing Hawaii that "the existing customs relations between the Spanish "possessions ceded by the treaty and the United "States should remain unchanged until legislation "had been had upon the subject; but in the absence "of such provision the case is clearly controlled by "that of *DeLima* v. *Bidwell.*"

It thus appears conclusively that cession and possession united to make the Philippines domestic territory.

To contend that the Filipino insurrection made the Philippines hostile territory or attained to the character of territorial war in the sense of the law of nations, is simply another method of saying that the possession of the United States was not complete and to contradict the decision of this Court to that effect.

If the country was hostile country it is because it was controlled by or possessed in whole or in part by those exercising a jurisdiction other than that of the United States.

Manila, on that assumption, not then being in the complete possession of the United States, the territory held by the Filipino belligerents would be, in international law, a foreign country and the President as Commander-in-Chief might then tax commerce between it and the United States; but the Philippines, including necessarily Manila, have been held to be in the complete possession of the United States, and therefore we must respectfully insist that the position taken by the Government in this case has already been completely repudiated.

5. *The contention of the Government and ruling of the Court of Claims that Manila was "hostile territory" after the ratification, is wholly unsound.*

That "Hostile Territory" is territory which for the time is under the domination of another power, and therefore for the time foreign territory, is an accepted doctrine in our jurisprudence relating to international law. Such territory is foreign territory to the extent that obedience of its inhabitants to the temporary holder is exacted and sanctioned as a proper submission to the *de facto* sovereign.

This point is settled by the decisions of this Court arising during our Civil War and in the War of 1812.

In the Prize Cases, 2 Black, 635, at 673-4, this Court says:

> "The ports and territory of each of these States "are held in hostility to the General Government. "*It is no loose unorganized insurrection,* having no "defined boundary or possession. It has a boundary "marked by lines of bayonets and which can be "crossed only by force—south of this line is enemies' "territory, because it is claimed and *held in posses-* "*sion by an organized hostile and belligerent* "*power.*"

In Coleman *v.* Tennessee, 97 U. S., 517, this Court says:

> "The doctrine of international law on the effect of "military occupation of enemy's territory upon its "former laws is well established. Though the late "war was not between independent nations, but be- "tween different portions of the same nation, *yet* "*having taken the proportions of a territorial war,* "*the insurgents having become formidable enough* "*to be recognized as belligerents, the same doctrine* "*must be held to apply.*"

In other words, there was in Tennessee some power which could make laws and could act for its own people in a distinct designated territory. Unless there was some such power recognized by the United States in the Philippines, the disorders there existing had not yet attained to the dignity of war. The Government invokes rules of International law, but until insurgents ripen into belligerents there can be no basis for the application of International law. The Filipino insurgents have never been recognized as belligerents, but (as held by Supreme Court in Fourteen Diamond Rings), the President has simply been

"preserving order and suppressing insurrection in "the territory of the United States," and "its legal "title and *possession* (of the latter), remain unaf- "fected."

But even during the Civil War, where the enemy was a recognized belligerent, the commander of the Union forces would not have had the right, upon the capture of a port from the Confederate forces, to impose duties upon imports from a Union port.

This is clearly brought out by Mr. Justice Brown's illustration, *Dooley Case,* 182 U. S., at 234, that during our Civil War a military commander in a Southern port could hardly impose duties upon merchandise arriving from ports of his own country (*supra,* p. 9).

But in the case of Manila, the military commander had far less right to impose duties after the ratification of the treaty than in the hypothetical case during the Civil War, for Manila *was never in the possession of the insurgents* and was never after the ratification "captured territory."

Birkhimer, in his work on Military Government and Martial Law (p. 53), says:

"Districts occupied by rebels TREATED AS BELLIGER- "ENTS are in contemplation of law, foreign. The "same principles govern intercourse therewith dur- "ing military occupation as though they belonged to "an independent belligerent. *They are enemy's ter- "ritory because they are held by a hostile military "force.*"

In the Castine case, speaking of the hostile occupation of Castine by the British during the War of 1812, this Court says:

"Castine was *therefore* during this period *so far* "*as respected our revenue laws to be deemed* "*a foreign port,* and goods imported into it "by the inhabitants were subject to such duties only "as the British Government chose to require. Such "goods were in no correct sense imported into the "United States."

U. S. *v.* Rice, 4 Wheat., 246, 254.

"By the conquest and occupation of Castine that "territory passed under the *allegiance and sover-* "*eignty of the enemy.*" * * *

U. S. v. *Haywood,* Story, *J.,* Fed. Cases, No. 15336, Vol. 26, p. 246.

The situation cannot be better summed up than by a comparison of the doctrine laid down in the *Fourteen Diamond Rings,* 183 U. S., 176 (*supra,* p. 15), with the doctrine laid down in the opinion of the Court of Claims.

The Court of Claims (Finding XI, p. 17), finds as a fact:

"The result of this insurrectionary movement and "the armed hostilities against the United States in "the Philippine Islands growing out of the same as "above described was a state of war throughout the "Philippine Islands which continued until July 4th. "1902, when the same was officially declared to be at "an end. *During this time said Islands were hos-* "*tile territory.*"

And states in the opinion:

"At the time the ratifications of the Treaty of "Peace were exchanged the Treaty had thereafter "the force of law, but by reason of the war existing "in the Islands at the time it failed to become effec- "tive *and it, as well as all other merely civil law, was*

"*suspended and superseded by military law* until "such time as it might be possible to put the treaty "and civil law in force, and establish proper admin- "istrative and judicial authorities to administer and "enforce the same. The vital point is that until the "military forces of the United States had suppressed "armed resistance against its authority and *estab-* "*lished its sovereignty in the Islands the Govern-* "*ment could not give the effect to the Treaty* con- "templated by the high contracting parties." (Warner-Barnes Record, pp. 21 & 22.)

This was not the real situation. The real situation was in the language of this Court in the *Diamond Rings*, that the Government was "preserving order and sup- "pressing insurrection *in territory of the United* "*States;*" to this end they could and did exercise the rights of martial law in controlling not only trade *with the insurgents* but all communication or even correspondence with them. (Gen. McArthur's Proclamation, Dec. 20, 1900; War Department Reports, June 30, 1901; Report of Lieutenant-General, Part II, p. 91.)

There is no evidence that any such restriction was ever placed or intended to be placed upon the importation of merchandise from the United States into the Port of Manila, and the exactions now complained of must rest solely upon the right of a military conqueror to collect the contributions theretofore payable to the sovereignty whose country is so occupied.

6. *The facts as to the extent and nature of the insurrection as found by the Court of Claims in the Warner, Barnes case and as alleged in the answer in the Lincoln case are contrary to historical facts of which this Court takes judicial notice.*

As the President in his annual message to Congress, in 1899, says:

"In this manner (the Treaty of Paris and the pay-
"ment of the sum of twenty million dollars under
"the Act of March 2, 1899) the Philippines came to
"the United States. The Islands were ceded by the
"Government of Spain, *which had been in undis-*
"*puted possession of them for centuries. They*
"*were accepted* not merely by our authorized com-
"missioners in power under the order of the Execu-
"tive, *but by the constitutional and well-considered*
"*action of the representatives of the people of the*
"*United States* in both Houses of Congress. I had
"every reason to believe and still believe the transfer
"of sovereignty was in accordance with the wishes
"and aspirations of the great mass of the Philip-
"pine people. * * * In my order of the 19th of
"May, 1898, the commander of the military expedi-
"tion dispatched to the Philippines was instructed to
"declare that we came not to make war upon the
"people of that country, 'nor upon any party or
"faction among them, but to protect them in their
"homes, in their employments and in their personal
"and religious rights.' That there should be no
"doubt as to the paramount authority there, on the
"17th of August, it was directed that *'there must be*
"*no joint occupation with the insurgents;'* that the
"United States must preserve the peace and protect
"persons and property within the territory occupied
"by their military and naval forces; that the in-
"surgents and all others must recognize the military
"occupation and authority of the United States. As
"early as December 4, before the cession, and in
"anticipation of that event, the commander in
"Manila was urged to restore peace and tranquility
"and to undertake the establishment of a beneficent
"government which should afford the fullest security
"for life and property.

"On the 21st of December, after the treaty was "signed, the commander of the forces of occupation "was instructed 'to announce and proclaim in the "most public manner that we come not as invaders "and conquerors, but as friends to protect the "natives in their homes, in their employments and in "their personal and religious rights.' * * *

"But before their (the Philippine Commission's) "arrival at Manila, the sinister ambition of a few "leaders of the Filipinos had created a situation full "of embarrassment for us and most grievous in its "consequences to themselves. The clear and im- "partial preliminary report of the Commissioners, "which I transmit herewith gives so lucid and com- "prehensive a history of the present insurrectionary "movement that the story need not be here repeated (pages 44 and 45).

"* * * No sooner had our army captured "Manila than the Filipino forces began to assume an "attitude of suspicion and hostility which the utmost "efforts of our officers and troops were unable to "disarm or modify. * * * On the night of Feb- "ruary 22d * * * considerable numbers of "armed insurgents entered the city by waterways "and swamps and in concert with confederates in- "side attempted to destroy Manila by fire. They "were kept in check during the night and the next "day *driven out of the city* with heavy loss" (page 46).

"Everything indicates that with the speedy sup- "pression of the Tagalog rebellion life in the archi- "pelago will soon resume its ordinary course under "the protection of our sovereignty, and the people of "these favored islands will enjoy a prosperity and "freedom which they have never before known.

"Already hundreds of schools are open and filled "with children. Religious freedom is sacredly as- "sured and enjoyed.

"*The courts are dispensing justice.* Business is

"beginning to circulate in its accustomed channels. "Manila, whose inhabitants were fleeing to the coun- "try a few months ago, *is now a populous and thriv- "ing mart of commerce.* * * * *The islands lie "under the shelter of our flag. They are ours by "every title of law and equity.* They cannot be "abandoned. If we desert them we leave them at "once to anarchy and finally to barbarism. * * * "The suggestion has been made that we could re- "nounce our authority over the islands and, giving "them independence, could retain a protectorate "over them. * * * Such an arrangement would "involve at the outset a cruel breach of faith. *It "would place the peaceable and loyal majority, who "ask nothing better than to accept our authority, at "the mercy of the minority of armed insurgents* (p. 51).

"* * * Until Congress shall have made known "the formal expression of its will, I shall use the "authority vested in me by the Constitution and "the statutes *to uphold the sovereignty of the United "States* in those distant islands *as in all other places "where our flag rightfully floats"* (page 51).

"* * * No effort will be spared to build up "the waste places desolated by war and by long years "of misgovernment. We shall not wait for the end "of strife to begin the beneficent work. *We shall "continue* as we have begun, to open the schools and "the churches, to set the courts in operation, *to "foster industry and trade*, and agriculture, and in "every way in our power to make these people whom "Providence has brought within our jurisdiction feel "that it is their liberty and not our power, their "welfare and not our gain, we are seeking to en- "hance" (page 52).

The Secretary of War, in his Report, 1899:

"It is probable that at any time a column of troops "*could have been put anywhere on the island of*

"*Luzon as against any resistance which the insur-*
"*gents could have offered,* * * * but there were
"not the troops necessary to garrison the towns or
"to maintain any far extended line of communica-
"tion. No attempt was made accordingly to occupy
"the country *except in the vicinity of Manila,* etc.

"On the 11th of February (1899) the City of Iloilo,
"on the Island of Panay, the second port of the
"Philippines in importance, was occupied (pp. 6, 7).
"* * * On the north of our line stretched the
"great plain of Central Luzon, extending north from
"Manila almost 120 miles. * * * In this terri-
"tory Aguinaldo exercised a military dictatorship,
"and with a so-called cabinet *imitated* the forms of
"civil government, etc. * * * (pp. 8, 9).

"On the 24th of November (1899), Gen. Otis was
"able to telegraph to the Department as follows:

"'*Claim to government by insurgents can be made*
"'*no longer under any fiction. Its Treasurer, Sec-*
"'*retary of the Interior and President of Congress*
"'*in our hands, its President and remaining cabinet*
"'*officers in hiding, evidently in different central*
"'*Luzon provinces; its generals and troops in small*
"'*bands scattered through these provinces acting*
"'*as banditti or dispersed playing the role of*
"'*Amigos with arms concealed*' (p. 10).

"Since that time our troops have been actively
"pursuing the flying and scattered bands of in-
"surgents, further dispersing them, making many
"prisoners and releasing many Spanish prisoners
(p. 10).

"It is gratifying to know that as our troops got
"away from the immediate vicinity of Manila, they
"found the natives exceedingly friendly, and both
"men and animals were able to live upon the country,
"etc.

"This was doubtless due in some measure to the
"fact that the Pampangos, etc., and the Pangasi-
"nanes, etc., are unfriendly to the Tagalogs, and

"had simply submitted to the *military domination "of that tribe* from which they were glad to be re- "lieved.

"This is emphasized by a report from General "Wheaton, that he had been obliged to guard the "wife and infant son of Aguinaldo to prevent the "natives from killing them (p. 11).

"Wherever the permanent occupation of our "troops has extended in the Philippine Islands civil "law has been immediately put in force. The courts "have been organized and the most competent and "learned native lawyers have been appointed to pre- "side over them.

"A system of education has been introduced and "many schools have been established. *It is believed "that in the City of Manila a greater number of "good schools, affording better facilities for primary "instruction, exist to-day than at any previous time "in the history of the City"* (p. 12).

The public facts upon which these cases rest are no other than the facts known to and considered by the Court in the *Diamond Rings* case and the doctrine of that case is conclusive of the present controversy.

7. Congress has not ratified the collection of the duties involved in these cases.

In the Warner-Barnes case, the Court below (Rec., p. 23) referred to the Act of July 1, 1902, 32 Stats., 692, Section 2, under which the Government claimed in that Court, and will doubtless urge here, that the collection of the duties in suit was ratified by Congress.

The petition in the Warner-Barnes case was filed January 18th, 1902 (Record, page 1), nearly six months before the passage of that Act, and the petition in the Lincoln case was filed March 29, 1902 (Record, page 8).

If, as we claim, the original exaction of the duties was illegal, then the claimants, upon filing their petition under existing law, acquired a vested right to their recovery, which could not be taken away by subsequent legislation (*DeLima* v. *Bidwell,* 182 U. S., at 199).

But the language of the Act does not bear the construction claimed for it by the Government.

The section in question reads as follows:

> "That the action of the President of the United "States heretofore taken *by virtue of the authority* "*vested in him as Commander-in-chief of the army* "*and navy, as set forth in his order of July 12th,* "*1898,* whereby a tariff of duties and taxes, *as set* "*forth by said order,* was to be levied and collected "at all ports and places in the Philippine Islands up- "on passing into the occupation and possession of the "forces of the United States, together with the sub- "sequent amendments of said order, are hereby ap- "proved, ratified and confirmed, and the actions of "the authorities of the Government of the Philippine "Islands *taken in accordance with the provisions of* "*said order,* and subsequent amendments, are hereby "approved."

The Court will note that the Act of Congress does not in express terms ratify the collection of duties upon imports from the United States, but only ratifies the action of the President, whereby a tariff of duties, *as set forth by the order,* was to be collected, and the actions of the local authorities taken in *accordance with the provisions of said order.* As we have seen above at pages 12 and 13, the terms of the Philippine order are substantially identical with those of the Porto Rican order. The Porto Rican order has been judicially construed by this Court in the first Dooley case to authorize the collection of

duties on imports from the United States only up to the time when the treaty was ratified. The Philippine order must, as we have said, necessarily be similarly construed. The President did not at any time by any order subsequent to April 11, 1899, the date of the ratification of the treaty, expressly declare that importations from the United States were included within the terms of the order of July 12, 1898, nor did he promulgate any further order when this Court on May 27th, 1901, declared the proper construction of the similar Porto Rican order. Moreover, more than a year before the passage of this Act, this Court had decided in the Dooley case (182 U. S., at 236), that the authority vested in the President, as commander in chief, did not extend to the enforcement of a tariff, after the ratification, against merchandise from the United States. Therefore the ratification by Congress of the "action of the President * * * taken by virtue of the authority vested in him as Commander-in-chief of the army and navy," did not by its own terms include action *taken by the President beyond his authority as Commander-in-chief.*

It is well settled that where Congress re-enacts a former statute, which has been judicially construed, it is presumed that Congress adopts the judicial construction of the former act, so when Congress ratifies that which has been done by virtue of the authority vested in the President and in accordance with the provisions of an Executive order, and this Court has previously stated the extent of this authority and construed the language of the order, it must be presumed that Congress intended to adopt in its ratification the judicial construction which the Executive order had received and that Congress knew the extent and limitations of the authority vested in the Com-

mander-in-Chief as decided by this Court. Therefore the only legal effect of this ratification is that so much of the order of July 12, 1898, as imposed duties upon imports into the Philippines from foreign countries (and the United States prior to April 11, 1899, was with respect to the Philippines a foreign country) is ratified and the collection of duties thereunder legalized. It would be a forced and strained construction of the act to hold that Congress intended by indirection to give to the President retroactively a power which this Court had held that he did not possess and to overthrow the construction which this Court had placed upon the identical language in the Porto Rican Act.

The supposed act of ratification by Congress therefore has no bearing upon either the construction of the order of the President under which the duties in suit were collected nor upon the question of the power of the President to impose these duties.

POINT II.

THE JUDGMENTS BELOW SHOULD BE REVERSED.

All of which is respectfully submitted.

February, 1905.

PAUL FULLER,
FREDERIC R. COUDERT,
HENRY M. WARD,
Counsel for Plaintiffs
in Error and Appellant.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1904.

WARNER BARNES & CO., LIMITED,
Appellants,
v.
THE UNITED STATES.
} No. 466.

Brief of Herbert & Micou,

Representing Certain Claimants Having Interests Similar to Those of Appellants.

Statement.

The clients we represent are some of them United States citizens, some natural persons subjects of governments permitting themselves to be sued by citizens of the United States, and one a corporation incorporated under the laws of Great Britain. They claim for duties collected at Manila, P. I., under protest, between April 11, 1899, and March 8, 1902, upon goods, wares and merchandise of the growth, produce and manufacture of the United States, and brought from the United States, and are directly interested in your decision upon the orders enforced at the port of Manila from April 11, 1899, to March 8, 1902.

Claimants in the case of record did, by their counsel, after the finding of facts by the Court of Claims, request said court to amend and supplement said findings (pp. 24–

27, Rec.), which request was overruled, and an appeal taken. Whether the court should have made these amended and supplemental findings, asked and refused, is therefore so raised in the record that this court can pass upon that question.

Mahan v. *United States*, 14 Wall. 109.
United States v. *Driscoll*, 95 U. S. 347.

BRIEF AND ARGUMENT.

As to the preliminary question, whether a corporation incorporated under the laws of Great Britain can sue in the Court of Claims, the court below in this case has found that it can, and the trend of authority clearly sustains that view.

Barrow Steam Ship Co. v. *Kane*, 170 U. S. 110, 111, and authorities there cited.

This court has thoroughly and recently settled the law of this case, in the Insular cases, and we need only consider the differences counsel for defendants attempt to make between the Porto Rican cases and the case in question.

Attempted Distinction, on the Ground that the Philippines Were Hostile Territory.

Defendants admit, what was decided by this court in the *Diamond Rings* case, that when the treaty between Spain and the United States became effective the Philippine Islands ceased to be Spanish and passed under the sovereignty and dominion of the United States; but they contend that such islands remained hostile territory, and that that fact gave a right to levy duties in the Philippines upon goods coming from the United States, though this court has said no such right existed in Porto Rico.

The Insular cases and authorities there cited establish the following:

That this court has never sustained the right by executive order to levy duty upon goods coming from the United States, except within foreign territory. The distinction made has uniformly been between domestic territory and foreign territory. Where the right so to levy duty has been sustained the territory has frequently been hostile, but this court has never based the right on that fact but only on the fact that the territory was foreign.

Mr. Justice Brown in the *Dooley* case says:

"For instance, it is clear that while a military commander during the civil war was in the occupation of a southern port he could impose duties upon merchandise arriving from abroad, it would hardly be contended that he could also impose duties upon merchandise arriving from ports of his own country. His power to administer would be absolute, but his power to legislate would not be without certain restriction—in other words, they would not extend beyond the necessities of the case."

182 U. S. 234.

In the court below there was much oral contention over this statement, counsel for defendants contending that it made for them, for the reason that the necessities of the case in the Philippines removed the restrictions on the military authority to legislate. We do not presume that this court spoke unadvisedly when it used this illustration of a southern port, and meant that in a case nothing like so strong as the illustration, the necessities could so remove restrictions upon the power to legislate as to permit a military commander to impose, in domestic territory, duty upon goods brought from the United States, even if it meant that the court conceived there would ever be such necessities of a case as would permit this.

The Southern States had a *de facto* government in abso-

lute control of definite hostile territory; but the Southern States were not foreign territory. The illustration makes most plain the distinction between the rights of a military commander on foreign and on only hostile territory, for the court says it is clear that in the occupation of a southern port he could impose duties upon merchandise arriving from abroad, yet it would hardly be contended that he could impose such duties upon merchandise brought from his own country. This very thing that the court there said would hardly be contended for, the defendants are contending for here.

Dooley v. *United States*, from which comes the statement quoted, cites with approval the decision years before by the Supreme Court, that goods brought from the United States into the port of Tampico, Mexico, when we were occupying that port, were subject to duty. Why should the court cite that case with approval and yet say it would hardly be contended that the same thing could have been done at a southern port during the civil war? For the very obvious reason that the South was not foreign territory. The South was just as much hostile territory as was Mexico, and if the true distinction be between domestic and hostile territory, and not between domestic territory and foreign territory, then the illustration so aptly used of a southern port not only meant nothing but was wrong. But that has never been the distinction. As decided in the *Dooley* case, duties levied in Porto Rico on goods brought from the United States were sustained during the time that Porto Rico was Spanish territory, while duties continued to be levied under the same orders after Porto Rico was ceded to this country were held to have been improperly collected.

The Court of Claims undertakes to find as a fact that there was a war in the Philippines and that the islands were hostile territory. That is immaterial so long as the

Philippines had ceased to be foreign territory, and it has been decided that they did so cease when the treaty went into effect, in the *Diamond Rings* case.

The finding that there was war in the Philippines, as shown by the facts cited to sustain this conclusion, is based very much upon the idea of war in a material sense, as contradistinguished from war in a legal sense. It is too well established to require citation of authority, that the determination of the existence of war in a legal sense is not a question for the courts but for the political department of the Government. The concentration of troops in the Philippine Islands and their efforts to suppress insurrection no one will deny, but we do not presume this court would entertain for a moment the idea that the political department of this government ever recognized a state of war between this country and the insurgents in the Philippine Islands. In fact, we consider that this court has already disposed of that question, as likewise of the question that a distinction exists because of hostilities between the situation in the Philippine Islands and in Porto Rico, so far as affects the levying of duties upon goods coming from the United States.

"It is further contended that a distinction exists in that while complete possession of Porto Rico was taken by the United States this was not so as to the Philippines, because of the armed resistance of the native inhabitants to a greater or less extent.

"We must decline to assume that the Government wishes thus to disparage the title of the United States, or to place itself in the position of waging a war of conquest.

"The sovereignty of Spain over the Philippines and possession under claim of title had existed for a long series of years prior to the war with the United States. The fact that there were insurrections against her, or that uncivilized tribes may have defied her will did not affect

the validity of her title. She granted the islands to the United States and the grantee in accepting them took nothing less than the whole grant.

"If those in insurrection against Spain continued in insurrection against the United States, the legal title and possession of the latter remained unaffected.

"We do not understand that it is claimed that in carrying on pending hostilities the Government is seeking to subjugate the people of another country, but on the contrary, that it is preserving order and suppressing insurrection in territory of the United States. It follows that the possession of the United States is adequate possession under legal title, and this can not be asserted for one purpose and denied for another. We dismiss the suggested distinction as untenable."

The Diamond Rings Case, 183 U. S. 180.

Now what more is this contention, that the Philippines is hostile territory, than the same that was made in the *Diamond Rings* case, and of which the court said:

"We dismiss the suggested distinction as untenable"?

The Duties Were Never Levied in Hostile Territory.

The request for amendment to the finding of facts by the court below, which, as already stated, are properly here for review, include the following:

"Twenty-second: Manila was never in the possession of the insurgents." (P. 25, Rec.).

This fact herein requested to be found, is of too common knowledge for dispute. The world knows it to be true, and the point we make is:

Even if the court had not dismissed, in the *Diamond Rings* case, as untenable, the argument that there is a distinction to be made in the Philippines because there there was hostile territory, and it be the occupancy of hostile

territory and not foreign territory that gives the right to levy duties under military orders, the hostile territory theory would still not be applicable here, the duties never having been levied in hostile territory.

In occupying the city and port of Manila after the treaty of peace, we were not occupying hostile territory. The present case is as much stronger, as it is different from, the illustration used by *Mr. Justice* Brown in the *Dooley* case, of a southern port. Long before, and at the time of the treaty of peace with Spain became effective, the United States had taken possession of the port and city of Manila, and that port and city have been in our undisputed possession ever since. Our possession actual and accompanied by occupancy began when we took the port and city from Spain. This possession by occupancy in time of war when the treaty of peace went into effect became absolute.

This court has said :

"The Philippines were not simply occupied, but acquired, and having been granted and delivered to the United States, by their former master, were no longer under the sovereignty of any foreign nation. * * * The Philippines thereby ceased, in the language of the treaty, 'to be Spanish'; ceasing to be Spanish, they ceased to be foreign country. They came under the complete and absolute sovereignty and dominion of the United States, and so became territory of the United States over which civil government could be established. The result was the same although there was no stipulation that the native inhabitants should be incorporated into the body politic and none securing to them the right to change their nationality. Their allegiance became due to the United States, and they became entitled to its protection."

The Diamond Rings Case, 183 U. S. 178, 179.

Now if at the time that the Philippines ceased to be foreign and became domestic territory, or if after then

the insurrection in the islands ever reached proportions where there was a *de facto* insurrectionary government, possessing a fixed or otherwise hostile territory, the city and port of Manila never was within the limits of such *de facto* government's hostile territory. The illustration of a southern port that was hostile territory being taken and occupied by Federal troops does not apply here at all. This is the case of a port that was never, during the time it is claimed there was a war between the United States and the Filipinos, within territory hostile to the United States. The illustration that would apply here would be:

During the civil war, with hostile territory to the southward, could a military commandant at, say the port of Baltimore, have levied duty upon goods coming into that port from New York? This is precisely the right that is being contended for here. Counsel say Manila was full of insurgent sympathizers. Baltimore was intensely Southern in its sympathies. Many of its citizens were regarded with suspicion; but Baltimore was never in hostile territory, and the fact that to the southward was hostile territory could not have given to a military commander the right to levy duties upon goods brought from New York to Baltimore.

Counsel have contended Manila was a base of supplies for carrying on military operations against the insurgents. San Francisco also was a base of supplies for these operations. It was from there that troops were sent and supplies shipped, but that could give no right to have levied at San Francisco a duty upon goods coming from New York.

Orders Under Which These Duties Were Collected.

ORDER OF JULY 12, 1898:

This order was issued during the war with Spain. October 13, 1898, its operation was by an order of the

President suspended, but went into effect again November 15, 1898, and continued thereafter in force, except as modified by certain amendments thereof, made by the order of the President. This order was in force at the time of the making of the treaty, the ratification thereof, and until November 15, 1901. In the court below counsel for defendants seemed to assume that in disputing the right to levy duties under this order after the Philippine Islands ceased to be foreign and became domestic territory, that we were in some way disputing the right of the President, after a country that had been foreign had been ceded to us by treaty, to rule that country and to enforce laws there until Congress should legislate. We are not disputing that right of the President at all. That he has such a right is distinctly declared in the *Dooley* case and is recognized in other cases cited in the Insular cases. The order of the President was not done away with by the treaty. The change that was wrought by the treaty was merely this: Up to the time that it became effective the Philippines were, as to the United States, foreign territory and goods coming into the Philippines from the United States came from foreign territory. This order was therefore enforceable against such goods; but when the treaty became effective the relations of the Philippines to us were changed. The islands became domestic territory, the United States ceased, as to them, to be a foreign country, and the goods coming in from the United States no longer came from a foreign country; and therefore as against such goods the order could not be enforced. It, however, still stood, and was enforceable on goods that came from Germany, or France, or Austria, or from any country that was still foreign to the Philippine Islands. The very same thing was passed upon in the *Porto Rican* case. The order, substantially the same, of January 20, 1899, issued by the President, continued to be enforced after the

cession of Porto Rico to the United States, and this court had no difficulty in finding that it was enforceable against the United States just so long as the United States was foreign territory to Porto Rico, but that it was no longer enforceable as soon as Porto Rico ceased to be such foreign territory, and that, without doing any violence whatever to the right of the President to rule Porto Rico and enforce laws there after it was ceded to us, until such time as Congress should legislate upon the subject.

GENERAL ORDER No 49:

This is the first amendment of the Order of July 12, 1898. It was made by the military authorities in the Philippines and is merely a modification of schedules under the previous order. Under this modification duties were levied from October 23, 1899, to November 15, 1901. As to its effect upon duties levied on goods coming from the United States, it stands on precisely the same footing as the order of July 12, 1898.

TARIFF REVISION LAW OF 1901:

This is the next amendment. September 17, 1901, under instructions given by the President April 7, 1900, the Philippine Commission passed what it called the tariff revision law of 1901, which went into effect November 15, 1901, and under which duties were levied until March 8, 1902. This was a change of rates and it was made under instructions from the President contained in a letter to the Secretary of War for the guidance of the Philippine Commission. Said letter stated that so long as the insurrection continued the military arm must necessarily be supreme and instructed the commission to report to the Secretary of War, and that its actions would be subject to his approval. In this letter the President said:

"Upon every division and branch of the Government therefore must be imposed these inviolable rules:

"That no person shall be deprived of life, liberty or property without due process of law; that private property shall not be taken for public use without just compensation." (Report of the War Department, Vol. I, part X, p. 8.)

It should here be stated that ~~while~~ what is commonly known as the Spooner Amendment was passed on March 2, 1901, ~~before~~ after the instructions above referred to of the President, of April 7th, and ~~consequently~~ before the Philippine Commission passed, September 17, 1901, the schedule of duties now under discussion, but that this tariff regulation was never passed by the Philippine Commission under any authority to legislate which it is sought to show was conferred upon the President by the Spooner Amendment. To show that this is the fact it is necessary to consider,

First, what this amendment was, and,

Second, what were the instructions of the President to the Commission.

This was the amendment:

"All military, civil and judicial powers"—

Where?—

"necessary to govern the Philippine Islands * * * shall, until otherwise provided for by Congress, be vested in such person and persons and shall be exercised in such manner as the President of the United States shall direct, for the establishment of civil government and for maintaining and protecting the inhabitants of said islands in the free enjoyment of their liberty, property and religion. * * *

"Until a permanent government shall have been established in said archipelago; all reports shall be made to Congress on or before the first day of each regular session, of all legislative acts and proceedings of the temporary government instituted under the provisions hereof."

Act March 2, 1901, 31 Stat. L. p. 910.

Now we contend that this act, so far as it attempted to confer upon the President all military, civil and judicial powers necessary to govern the Philippine Islands, was an attempt to delegate power to make the laws, a power necessarily involving a discretion as to what the laws shall be—precisely what this court has said can not be done.

"The true distinction," says Judge Ranney, "is between the delegation of power to make the law, which necessarily involves a discretion as to what it shall be, and conferring authority or discretion as to its execution."

Field v. *Clark*, 143 U. S. 649, holding that the latter power could be delegated but the former not.

When this amendment was under discussion in Congress it was contended that there was precedent for it in the legislation relative to the acquisition of Louisiana. A comparison, however, of the provisions shows a vital difference. The Louisiana statute read:

"That until the expiration of the present session of Congress, unless provision for the temporary government of said territory be sooner made by Congress, all military, civil and judicial power"—

Where?—

"*exercised by the officers of the existing government of the same* shall be vested in such person and persons, and shall be exercised in such manner as the President of the United States shall direct for maintaining and protecting the inhabitants of Louisiana in the free enjoyment of their liberty, property and religion."

2 Stat. L. p. 245.

What was vested in the President here was the exercise of military, civil and judicial powers of the existing government in Louisiana, a proper authority to confer upon him, because one that involved no discretion as to what

the law should be, a power which this court held, in the authority just cited, Congress could delegate to the Executive.

While the authority attempted to be conferred by the Spooner amendment was authority to make the law involving a discretion as to what the law should be, the very converse of the authority conferred in reference to Louisiana and an attempt to delegate just what the Supreme Court has said could not be delegated.

President McKinley, however, has removed entirely from the field of controversy the question of whether or not the Spooner amendment conferred upon him a proper authority, for he did not act under that amendment. In the report of the Secretary of War to the President November 27, 1901, the Secretary says, referring to the Spooner amendment:

"These provisions were immediately communicated to the Commission by cable, with the following instructions":—

(Now we specially ask the court to mark these instructions)

"'Until further orders government will continue under existing instructions and orders.'"

Thus while a copy of the amendment was sent out to the Commission, the President, through the Secretary of War, distinctly indicated to the Commission, not that it should proceed under these orders and legislate under the authority attempted to be conferred upon him by Congress, but until further orders that the government the Commission conducted would continue under existing instructions and orders. This eliminates the question that the President was proceeding under authority of Congress in the change of schedule which was made by the Philippine Commission.

It was proper that the provision enacted by Congress should be communicated immediately to the Commission, for besides the authority attempted to be conferred on the President, which by his direction to continue under existing instructions and orders he did not elect to proceed under, the provision contained information which the Commission should have. It provided that full reports of the acts and doings of said government, of conditions of the archipelago and of its people should be made to the President, including all information which might be useful to Congress in providing for a more permanent government. It also contained certain limitations absolutely binding upon the Commission and the President, relative to the sale, lease and disposition of public lands, timber thereon, or mining rights therein, and the granting of franchises.

Congress Has Not Attempted to Ratify the Collection of These Duties.

It is contended that if these duties were illegally levied and without authority on the part of the President, that the defect has been remedied by ratification by Congress of the President's act. We contend, waiving for the time being whether Congress could ratify such action, that the action taken by Congress, relied on to show a ratification, fails to show the same.

Any attempt by ratification to make legal acts which at the time they were committed were illegal, would be retroactive legislation, and subject to the familiar construction that no statute shall be construed to operate retroactively except where it is clear such operation was intended, and that all doubts should be solved against such intention.

The first legislation relied on as showing ratification is the following provision from the act of March 8, 1902, 32 Stat. L. 54 :

"That the provisions of an act entitled 'An Act to revise and amend the tariff laws of the Philippine archipelago,' enacted by the United States Philippine Commission on the seventeenth day of September, nineteen hundred and one, shall"—

What?—
Be ratified?—
Not at all, but merely shall

"be and remain in full force and effect, and there shall be levied, collected and paid upon all articles coming into the Philippine archipelago from the United States the rates of duty which are required by the said act to be levied, collected, and paid upon like articles imported from foreign countries into said archipelago."

This legislation does not ratify the action of the Executive in levying duties under the act of the Philippine Commission, passed September 17, 1901, previous to March 8, 1902, when this law was passed. It is nothing more than an adoption by Congress for the future, of the same rates of tariff that this Commission had adopted. Had Congress intended to ratify the duties that had been collected by this Commission under its order of September 17, 1901, previous to March 8, 1902, it is but fair to presume that Congress would have so said.

The next legislation relied on to show a ratification is the act of July 1, 1902, 32 Stat. L. 691. So much of that act as bears upon this subject is as follows:

"That the action of the President of the United States in creating the Philippine Commission and authorizing said Commission to exercise the powers of government to the extent and in the manner and form, and subject to the regulation and control set forth in the instructions of the President to the Philippine Commission, dated April 7, 1900,"—

(and then follows certain other matters with which we are not concerned, such as creating the offices of civil governor and vice-governor, the establishment of certain executive departments of government in the island)

"is hereby approved, ratified and confirmed."

Now, what Congress ratified and confirmed by this was the action of the President in authorizing the Commission to exercise the powers of government in the manner and form, and subject to the regulation and control *set forth in his instructions of April 7, 1900.* Congress was most careful in its statement to thus limit its ratification. Those instructions of April 7, 1900, were as follows:

"Upon every division and branch of the Government, therefore, must be imposed these inviolable rules:

"That no person shall be deprived of liberty, or of property, without due process of law. That private property shall not be taken for public use without just compensation."

Report of the War Department, 1901, Vol. 1, Part 10, p. 8.

Thus the President expressly instructed the Commission not to deprive any person of his property without due process of law, or to take private property without just compensation.

As will appear from authorities cited further on, when we discuss the power of Congress to ratify the action of the President, it will be seen—

1. That a cause of action arose as soon as these duties were levied.

2. That a cause of action is private property of which claimants can not be deprived without due process of law.

The President did not authorize the Commission to make and enforce an act that would have the effect to de-

prive a person of his property without due process of law, or to take such property for public use without just compensation; but he expressly ordered the Commission not so to do. Congress in the legislation under consideration expressly limited its ratification to the action of the President in authorizing the Commission

"to exercise the power of government to the extent, and in the manner and form, and subject to the regulation and control, set forth in the instructions of the President of April 7, 1900."

It therefore did not ratify any power exercised by the Commission which by those instructions the President had ordered the Commission not to exercise.

Congress certainly did not show an intention to ratify the levying of these duties. President McKinley in his conduct of the affairs in the Philippines had met an emergency, had met it ably, and as every one who meets an emergency does, had had to take responsibilities, and in so far as he had done acts which Congress in the first instance could have delegated to him to do, it was proper and right, and there was a demand that Congress should ratify those acts; and this is all and everything that Congress either did or attempted to do. Calling into question the validity of acts done by executive order in the emergency that existed in the Philippines in nowise reflects upon the very able manner in which the new problems arising there were met, either by the President, the War Department, or the Insular Bureau of that Department. The problems were new, the difficulties were many, and of a character that required prompt action as they arose. It could not be expected that the military arm of the Government was infallible, that it should not, with the many things it was called upon to do, make some honest mistakes as to the extent of its power. The

levying of a tariff in the Philippines was a necessary thing. The enforcement of that tariff against goods coming from the United States, as long as the Philippines was foreign territory, was a proper thing. The enforcement after the Philippines ceased to be foreign territory was a mistake of law, but not an unnatural mistake, not one that anybody should be censured for, but certainly a mistake which the Government should now make good by a refund of these duties.

The next legislation relied upon to show ratification is Section 2 of the Act of July 1, 1902, 32 Stat. L. p. 691.

"That the action of the President of the United States heretofore taken by virtue of the authority vested in him as Commander-in-Chief of the army and navy, as set forth in his order of July 12, 1898, whereby a tariff of duties and taxes as set forth by said order was to be levied and collected at all ports and places in the Philippine Islands, upon passing into the occupation and possession of the forces of the United States, together with the subsequent amendments of said act, are hereby ratified and confirmed, and the action of the authorities of the Government of the Philippine Islands taken in accordance with the provisions of said order and subsequent amendments, are hereby approved."

What is ratified and confirmed in the above legislation is the action of the President heretofore taken *by virtue of the authority vested in him as Commander-in-Chief of the army and navy.* The *Dooley* case settled beyond dispute that after the cession to us of the territory acquired under the treaty with Spain the right to levy duties in that territory on goods coming from the United States was no longer vested in the President as Commander-in-Chief.

"Different considerations apply with respect to duties levied after the ratification of the treaty and cession of the island to the United States. Porto Rico then ceased to be a foreign country, and, as we have just held in *De*

Lima v. *Bidwell*, the right of the collector of New York to exact duties upon imports from that island ceased with the exchange of ratifications. We have no doubt, however, that, from the necessities of the case, the right to administer the government of Porto Rico continued in the military commander after the ratification of the treaty, and until further action by Congress. (*Cross* v. *Harrison*, above cited.) At the same time, while the right to administer the government continued, the conclusion of the treaty of peace and the cession of the island to the United States were not without their significance. By that act Porto Rico ceased to be a foreign country, and the right to collect duties upon imports from that island ceased. We think the corelative right to exact duties upon importations from New York to Porto Rico also ceased. The spirit as well as the letter of the tariff laws admit of duties being levied by a military commander only upon importations from foreign countries; and while his power is necessarily despotic, this must be understood rather in an administrative than in a legislative sense. While in legislating for a conquered country he may disregard the laws of that country, he is not wholly above the laws of his own.

* * * * * * *

"Without questioning at all the original validity of the order imposing duties upon goods imported into Porto Rico from foreign countries, we think the proper construction of that order is, that it ceased to apply to goods imported from the United States from the moment the United States ceased to be a foreign country with respect to Porto Rico, and that until Congress otherwise constitutionally directed, such merchandise was entitled to free entry.

"An unlimited power on the part of the Commander-in-Chief to exact duties upon imports from the States might have placed Porto Rico in a most embarrassing situation. The ratification of the treaty and the cession of the island to us severed her connection with Spain, of which the island was no longer a colony, and with respect to which she had become a foreign country. The wall of the Spanish tariff was raised against her exports, the wall

of the military tariff against her imports, from the mother country. She received no compensation from her new relations with the United States. If her exports, upon arriving there, were still subject to the same duties as merchandise arriving from other foreign countries, while her imports from the United States were subjected to duties prescribed by the Commander-in-Chief, she would be placed in a position of practical isolation, which could not fail to be disastrous to the business and finances of an island. It had no manufactures or markets of its own, and was dependent upon the markets of other countries for the sale of her productions of coffee, sugar and tobacco. In our opinion, the authority of the President as Commander-in-Chief to exact duties upon imports from the United States ceased with the ratification of the treaty of peace, and her right to the free entry of goods from the ports of the United States continued until Congress should constitutionally legislate upon the subject." (182 U. S. 234 and 236.)

Here it is decided that the authority of the President, as Commander-in-Chief, to exact duties upon imports from the United States ceased when Porto Rico became domestic territory.

His authority likewise ceased also as to the Philippines, and no duties levied under the President's order there after that time was action taken by virtue of authority vested in him as Commander-in-Chief of the army and navy, and not so being is by the express wording of this act excluded from ratification.

It is to be observed in this legislation that the action of the authorities of the government of the Philippine Islands, taken in accordance with the President's order and the subsequent amendments—and it was the action of these authorities on which our claims are based—are not attempted to be ratified and confirmed by Congress at all; but as is stated, are merely approved.

In other words, Congress ratifies and confirms in ex-

press terms the action of the President taken by the authority vested in him as Commander-in-Chief, and it approves—not ratifies—the action of the authorities of the government of the Philippine Islands in so far, and no farther, as they executed the orders of the President given under the authority vested in him as Commander-in-Chief.

What this court is quoted above as having said relative to Porto Rico receiving no compensation from her new relations with the United States, and that if her exports upon arriving there were subject to the same duties as merchandise arriving from other foreign countries, while her imports from the United States were subject to duties prescribed by the Commander-in-Chief, she would be placed in a position of practical isolation which could not fail to be disastrous to the business and finances of the island, is equally applicable to the Philippines. Furthermore, this court has held, in the *Diamond Rings* case, that there is no right correlative to what the Government is contending for here and that duties can not be exacted in the United States upon goods brought from the Philippines.

Congress Was Without Power to Ratify an Unlawful Levying of These Duties.

1. Because it could not ratify an act of the President which it could not in the first instance have delegated to him to perform.

2. Because Congress cannot deprive claimants of their property without due process of law, nor take private property for public use without just compensation.

As to 1—

We have already discussed the distinction between delegating to the President the power to make the law

involving a discretion as to what that law shall be, and conferring upon him authority or discretion to execute the law. Congress can delegate the latter power, but not the former.

From the cases we will now quote, ratification rests upon authority in the first instance, in the ratifying body, to have authorized the act. If Congress could ratify an act of the President that it could not in the first instance authorize, the line would be gone, so clearly drawn by the Constitution, between the executive and legislative branches of the Government. That line would be as effectually passed by sustaining the ratification of an act Congress could not in the first instance have authorized, as by sustaining an attempted authorization in the first instance where power to authorize did not exist.

It was suggested in the court below that Congress having itself power to legislate, it could ratify what the President had done, on the principle of principal and agent. In other words, that the President was acting as agent for Congress. We contend the case does not come within the category of principal and agent at all. Without authority there can be no agency. What A in the role of principal has no power to authorize, if done by B, A could not afterwards ratify. The Constitution has separated legislative powers from executive. The legislature can not assume the role of principal and by ratification confer upon the Executive legislative powers. If the Executive assumes legislative powers belonging only to the legislative branch of the Government, he does not do so as the agent of the legislative branch. He never was its agent, never could be made its agent to exercise legislative powers (by previous authorization) and consequently could not become such agent by subsequent ratification. All the cases we are about to cite lay down

the rule that there is no power to ratify save where the power to authorize existed in the first instance.

"If Congress or the legislative assembly" (speaking of the old legislative assembly here of the District) "had the power to commit to the Board the duty of making improvements and to prescribe that the assessments should be made in the manner in which they were made, it had the power to ratify the act which it might have authorized."

Mattingley v. *District of Columbia*, 97 U. S. p. 689.

In this the leading case relied on by counsel on the subject of ratification, the power to ratify is made dependent entirely on the power to authorize in the first instance, and so in all the authorities.

"But the healing statute must in all cases be confined to validating acts *which the legislature might previously have authorized.* It can not make good retrospective acts or contracts which it had and could have no power to permit or sanction in advance."

Cooley's Constitutional Limitations, pp. 544, 545, 7th Ed.

"All the authorities agree, as is apparent without authority, that the legislature can not ratify what it can not authorize. For the exercise of the power implies legislative authority over the subject as well at the time of the curative statute as at the time of the enabling statute. Legislative jurisdiction of the subject is equally essential at both times; both statutes rest on *the present authority of the legislature to authorize the proceedings and to prescribe its details.* Surely a statute could not authorize a new proceeding or sanction an old one in a matter presently without the scope of legislative authority. We know of no *exception to the rule* that the power to do a thing, or to authorize it to be done *nunc pro tunc*, implies present right."

Kimball v. *The Town of Rosedale*, 42 Wis. 413.

"The legislature has not the power to levy an assessment not uniform and equal in an incorporated city, for the purpose of improving the streets, nor can it after an assessment has been made by the municipal authorities for such purpose which is void for want of uniformity and equality validate it."

Head Note, *People* v. *Lynch*, 51 Cal. 15.

"In *Sykes* v. *Mayor*, 55 Mississippi, 115, 137, it was held that, after the Constitution of 1869 took effect, the legislature could not, by retrospective enactment, make valid an issue of municipal bonds executed prior to the adoption of that instrument without legislative authority; because, said the court, 'the measure of its power was the Constitution of December, 1869, and it could not ratify an act previously done, *if at the date it professed to do so it could not confer power to do it in the first instance.* It could authorize a municipal loan conditionally. In order to ratify and legalize a loan previously made, it was bound by the constitutional limitation of its power.' Further, in the same case,—

"'The idea implied in the ratification of a municipal act performed without previous legislative authority is, that the ratifying communicates authority, which relates back to, and retrospectively vivifies and legalizes the act, as if the power had been previously given.'

"Such statute is of the same import as original authority. * * * If the Constitution had altogether denied to the legislature the delegation of such power to counties, cities, and towns, it is manifest that it could not vitalize and legalize a subscription made before its adoption, and without authority of law. If that be so, it follows that, in dealing with the subject at all, it is bound by the limitation of section 14 of Article 12 of the Constitution."

Grenada County v. *Brogden*, 112 U. S. 260–261.

Ratification by Congress of an act of legislation by the executive is as distinct a proposition from the power of Congress itself to legislate as the latter proposition is distinct from the power of Congress to delegate its right to

legislate to the executive in the first instance. A failure to observe this distinction would be every whit and bit as dangerous and lead to as disastrous a result as to sustain the view that Congress, because it can itself legislate, could delegate that power in the first instance to the executive.

2. *Because Congress can not deprive claimants of their property without due process of law, nor take private property for public use without just compensation.*

Article 5 of the amendments to the Constitution of the United States provides:

"That no person shall be * * * deprived of * * * property, without due process of law; nor shall private property be taken for public use without just compensation."

The right to bring these actions arose just as soon as these duties were improperly levied.

This right was property guaranteed to the claimants by the above provision of the Constitution, and Congress could not deprive them of it. This independently of the question whether Congress could ratify an act of the executive that it could not in the first instance have authorized, and whether it attempted to ratify such act.

"And this right to bring an action of law, in other words, a legal chose in action, constitutes a valuable kind of personal property."

Darlington on Personal Property, p. 107.

This court has held, in the case of an action sounding in tort, that a right of action was property.

Angele v. *Chicago, St. P. M. and O. R. Co.* 151 U. S. 138.

The New York Legislature passed an act giving to the wife certain property as her sole and separate property, which it was attempted to construe covered a legacy left

to her, so that the husband could not bring suit for the legacy. The husband sued for the legacy; and the court first discussing the right of the husband to reduce to possession the legacy left to his wife, holding he had such a right, then says:

"A right to reduce a chose in action to possession is one thing, and a right to the property which is the result of the process is another and a different thing. But they are both equally vested rights. The one is a vested right to obtain the thing, with the certainty of obtaining it by resorting to the necessary proceedings, unless there be a legal defense, and the other is a vested right to the thing after it has been obtained. * * * At the time that these proceedings were commenced there is no doubt that the husband could have legally assigned his right to reduce the legacy into possession for a valuable consideration. He was then entitled to receive the legacy as his own by taking the necessary legal proceedings, and he will now be entitled to receive it, unless the right which he then had has been legally taken away; and if that right has been taken away, he has lost a vested right of the value of the legacy in question. What, then, has been the effect of the act of 1848?

"The Constitution of this State declares that 'no person shall be deprived of * * * property without due process of law.' Due process of law undoubtedly means, in the due course of legal proceedings, according to those rules and forms which have been established for the protection of private rights. Such an act as the legislature may, in the uncontrolled exercise of its power, think fit to pass is, in no sense, the process of law designated by the Constitution. This construction has been heretofore adopted (*Taylor* v. *Porter*, 4th Hill, 140); and it is so obviously sound that the mere statement of it is sufficient. Its correctness can not be made more apparent by argument or illustration.

"I think that the right of the respondent to recover the legacy of his wife, which existed at the time the statute in reference to married women went into operation, was properly within the meaning of the Constitu-

tion, and that he has not been deprived of it by the statute."

Westervelt v. *Gregg*, 12th New York, 208–9.

And here is another case to which we especially call the attention of the court:

"But the denial by Congress, through a retrospective law, of all redress to a person whose property or liberty was illegally taken under a military order, is a mode of discharging obligations, which, however convenient is not reconcilable with the principles of the Constitution. The Constitution confides to Congress only legislative power, and that to be exercised only for specific purposes. When, therefore, it undertook to determine in 1863 and 1866, that no injury to person or property, committed prior to that time, gave to the injured party a vested right of action, if committed under a military order, it assumed a judicial function which it is not authorized to perform. Whether this plaintiff was illegally arrested and imprisoned in 1862, depends solely upon the acts done and the laws in force at that time; and these facts are to be determined by judicial investigation, and are facts which no act of Congress can change. If his personal liberty or property was illegally taken from him, then at once accrued to him a right to redress in the courts, which no subsequent act of Congress can take away. The rights of persons and property are equally secured by the constitutional provision borrowed from Magna Charta, that no person shall be deprived of them without due process of law. That Congress has no power, by its own act to divest these rights, is universally conceded, and we are unable to perceive the difference in principle between an act seeking to divest them directly and one providing that, where they have been divested by unlawful violence, no remedy shall be had against the wrong-doer."

Johnson v. *Jones*, 44 Illinois, 144, 162.

Another case:

"Our attention has been called to the following section

of the Act of Congress of March 3, 1863 (Acts of 1863, p. 154):

"'Sec. 4. *And be it further enacted*, That any order of the President, or under his authority, made at any time during the existence of the present rebellion, shall be a defense in all courts to any action or prosecution, civil or criminal, pending or to be commenced, for any search, seizure, arrest, or imprisonment, made, done, or committed, or acts omitted to be done, under and by virtue of such order, or under color of any law of Congress, and such defense may be made by special plea, or under the general issue.'"

Construing this, the court says:

"This act was passed to deprive the citizens of all redress for illegal arrests and imprisonments; it was not needed as a protection for making such as are legal, because the common law gives ample protection for making legal arrests and imprisonments. The question here arises, then, can Congress enact that the citizen shall have no redress for a violation of his rights, secured to him by the following provisions of the Constitution of the United States, viz: Amendments 4 and 5: 'The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated'; 'No person shall be deprived of his life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation.'

"These sections prohibit the passage of a law by Congress authorizing the arrest of the citizen without just cause, because such arrest deprives him of his liberty. They also prohibit the passage of a law depriving him, or authorizing the depriving him of his property, except through a judicial sentence, or upon just compensation. * * * The right to damages to be recovered in a civil action, for false imprisonment, is a chose in action—is property—and passes to one's representatives at death, by the law of Indiana. *Gimble* v. *Smith*, 7 Ind., 527. Hence it is assignable. *Strong* v. *Clem*, 12 *id.*, 37.

Patterson v. *Crawford*, *id.*, 241, lays down the rule that such a right of action for a tort as would survive, is assignable, but overlooks the facts decided in *Gimble* v. *Smith*, *supra*, that the right of action for false imprisonment survives."

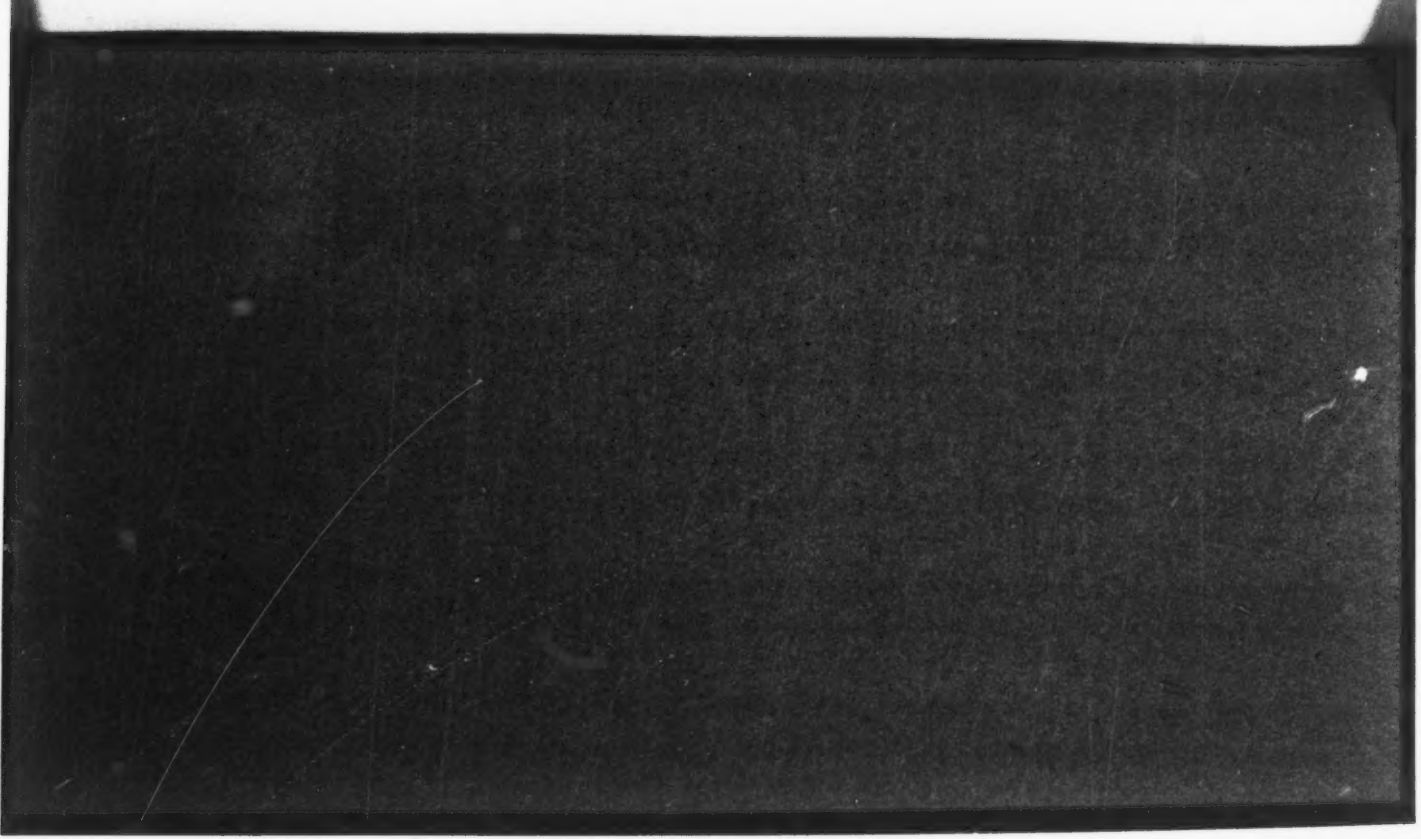
Griffin v. *Wilcox*, 21 Ind. 370.

The prohibition that no person shall be deprived of property without due process of law, nor shall private property be taken for public use without just compensation, refers to all the instrumentalities of the government, including the legislative authority and therefore is as binding upon Congress as upon any other of the instrumentalities of the government.

Chicago B. & Q. R. R. Co. v. *Chicago*, 166 U. S. 233–235.

H. A. HERBERT,
BENJAMIN MICOU,
Counsel.

February 23, 1905.



In the Supreme Court of the United States.

OCTOBER TERM, 1903.

FREDERICK W. LINCOLN AND OTHERS, trading as copartners under the firm name and style of H. W. Peabody & Co., plaintiffs in error, *v.* THE UNITED STATES, DEFENDANT IN error.	No. 491.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

SUGGESTION ON BEHALF OF THE UNITED STATES RESPECTING MOTION TO ADVANCE.

This is not the stage at which to indicate obvious points of jurisdiction respecting the peculiar function of the court below sitting as a court of claims, and the method of reaching this court under such circumstances by writ of error.

This is another Insular Customs case brought to recover the duties exacted in the Philippine Islands on goods entering those islands from the United States between December 13, 1900, and January 26, 1901. The duties were imposed under the provisions of "General Order No. 49"

of the United States military governor for the Philippine Islands, dated October 23, 1899, and the several orders amendatory thereof, while those orders remained in force, and before the revision of the tariff laws of those islands by the United States Philippine Commission of September 17, 1901, which took effect on November 15 thereafter. These duties were therefore exacted under the war power and prior to the passage of the Spooner resolution of March 2, 1901 (31 Stat., 910), the Philippine revenue act of March 8, 1902 (32 Stat., 54), and the act providing a civil government for the Philippines on July 1, 1902 (32 Stat., 691).

The single question is whether the duties were lawfully exacted under an order of the President as an exercise of the war power, while the port of Manila was in the actual possession of the United States, but while there was all about and beyond that immediate district a widespread and violent insurrection against the authority and the military forces of the United States. That insurrection has now been reduced by force of arms, and the particular order of the President is *functus officio*. The point involved has not indeed been fully considered, nor definitely decided. The status in the Philippines, however, has entirely changed. The exertion of the war power as such has completely ceased, and, continuing *sub modo* as police power, is now confined to sporadic outbreaks in remote and semi-civilized districts. Neither the

accomplishment of public policy nor the programme in administration—that is to say, no public rights—are dependent upon the prompt determination of the question before the court. The cause, therefore, may be of a certain general interest; it does not, however, involve grave public questions, but merely the claim of a private litigant to the refund of a certain sum of money, because, as alleged, it was illegally exacted.

I absolve counsel from any unwarrantable intention in stating to the court that the Attorney-General does not oppose the application, the statement being made under a misapprehension of the position of the Government. The Government does not consent, because it does not think the facts in the case, and the nature of the questions involved, demand advancement and prompt hearing and determination out of the regular order.

HENRY M. HOYT,
Solicitor-General.

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